Amy Barrette

RONALD R. CARTER, SR. AND JEAN CARTER, *et al.*	:	
	:	
v.	:	**EHB Docket No. 2011-003-L**
	:	**(Consolidated with 2011-165-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL & GAS CORPORATION, Permittee	:	**Issued: December 9, 2011**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Environmental Hearing Board denies a petition for supersedeas filed by several homeowners in Dimock, Pennsylvania because a supersedeas is only available if a party is threatened with unavoidable, irreparable harm before the case can be resolved, and these parties need not suffer any such harm. Although Cabot terminated temporary water supplies, temporary water deliveries will resume immediately for any Petitioner who simply indicates that he or she is willing to at least try a whole-house gas mitigation device paid for by Cabot and installed by plumbers hired by Cabot. No waiver of rights is required, and there is no cost or obligation of any kind. If Cabot is not able for whatever reason to install an effective treatment device it will be required to continue temporary water deliveries indefinitely. In addition, Cabot has agreed to pay each Petitioner anywhere from $50,000 to $398,872 with no strings attached and no questions asked. Only one Petitioner is due to receive less than $100,000. Six will receive over $200,000. Four more will receive more than $300,000. Again, Cabot has agreed to make these payments immediately with absolutely no obligation on the part of the Petitioners and no waiver of any past, present, or future rights. Indeed, most of the Petitioners have already asked for the funds. These funds will be more than sufficient to meet the Petitioners' water needs pending our final adjudication in this appeal.

E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

OPINION

On December 15, 2010, the Department of Environmental Protection (the "Department") entered into a consent order and settlement agreement ("COSA") with Cabot Oil & Gas Corporation ("Cabot") that addressed certain issues that had arisen in connection with Cabot's drilling of gas wells in Dimock and Springville Townships, Susquehanna County. Among other things, the Department determined that Cabot's activities adversely affected eighteen drinking water supplies that serve nineteen homes in an area denominated as the "Dimock/Carter Road Area," including those supplies owned by Ronald R. Carter, Sr. and Jean Carter, *et al.*, the Petitioners. Paragraph 6 of the COSA reads as follows:

> 6. ***Settlement of Restoration/Replacement Obligation.*** The claims by the Department regarding Cabot's obligations under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208, and 25 Pa. Code § 78.51, including any obligation of Cabot to pay for or restore and/or replace the Water Supplies, or to provide for ongoing operating or maintenance expense shall be satisfied, as follows:
>
> a. Escrow Fund.
>
> i. Within thirty (30) days after the date of this Consent Order and Settlement Agreement, Cabot shall establish nineteen (19) Escrow Funds and each Escrow Fund shall hold an amount equal to, whichever is greater: $50,000; or two times the assessed value by the Susquehanna County Tax Assessor of the property(ies) owned by the Property Owners within the Dimock/Carter Road Area. Such assessed values for each property owned by the Property Owners are listed in chart attached as Exhibit D;
>
> ii. Within ten (10) days after Cabot has established and funded the nineteen (19) Escrow Funds in accordance within Paragraph 6.a.i., above, Cabot shall notify each Property Owner, in writing, of the existence of the funds in the Escrow Fund for that Property Owner, the procedure by which the Property Owner can obtain his/her/their payment from the Escrow Fund.

E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

iii. Cabot shall pay all fees and costs associated with each of the Escrow Funds. The funds in the Escrow Funds shall be paid to Property Owners, their duly authorized attorney or representative or the heirs of the Property Owners in accordance with this Paragraph 6 and the Escrow Agreement attached hereto as Exhibit E. Exhibit E shall be the model of the Escrow Agreement that Cabot shall use for each of the Escrow Funds established under Paragraph 6.a.i., above, and is incorporated herein; and

iv. If the Escrow Agent and Cabot have not received the executed and notarized Receipt provided for in the Escrow Agreement from the Property Owner on or prior to the 45th day after the date that the Property owner has received written notice of the Escrow Fund in accordance with this Consent Order and Settlement Agreement, the Escrow Agent shall continue to hold the Escrow Fund until December 31, 2012. During such time period the Escrow Agent shall deliver all proceeds from the Escrow Fund to the Property Owner if and only if the Escrow Agent receives unqualified and unconditional written instruction to do so from a duly authorized representative of the Department and from a duly authorized representative of Cabot. If as of December 31, 2012, the Property Owner has not claimed and received the Escrow Fund, the Escrow Agent shall deliver all proceeds from the Escrow Fund to Cabot on January 2, 2013, together with all interest and/or earnings attributable to the Escrow Fund.

b. Effect of Notification to Department. After the time has passed for the Escrow Fund to be funded in accordance with Paragraph 6.a.i., above, and upon completion of the restoration activities described below, the Department's claims regarding Cabot's obligations under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208, and 25 Pa. Code § 78.51, to restore and/or replace a Water Supply that serves the property owned by a Property Owner shall be satisfied upon the Department's receipt of information from Cabot that verifies that: the nineteen (19) Escrow Funds have been established and fully funded in accordance with Paragraph 6.a.i., above; each of the Property Owners have received written notice from Cabot of the Escrow Fund and of the procedure by which the Property Owner can obtain his/her/their payment from such Escrow Fund; and each of the Property Owners have received written notice from Cabot that it will install a whole house gas mitigation device at the property as provided for below.

c. For each Property Owner, Cabot shall continue to provide and maintain temporary potable water and, as applicable, shall continue to maintain gas mitigation devices that it had previously installed until Cabot receives written

E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

notice from the Department that it has complied with all of the requirements of Paragraph 6.a.-6.b., above, for that Property Owner.

d. As long as Cabot provides temporary water to the Property Owners under Paragraph 6.c., above, from a water purveyor and/or water hauler, Cabot shall assure that the water purveyor/hauler has all licenses, permits, and/or other authorizations required under Pennsylvania law and Regulations, and that the Property Owners receive water in amounts sufficient to continually satisfy water usage needs until Cabot receives written notice from the Department that it has complied with all of the requirements of paragraphs 6.a.-6.b, above, for that Property Owner.

e. As of the date of this Consent Order and Settlement Agreement, Cabot has purchased whole house gas mitigation devices for residential water supplies within the Dimock/Carter Road Area and it has drilled new drinking water wells to serve other residences within the Dimock/Carter Road Area. Within 30 days of the date of this Consent Order and Settlement Agreement, Cabot shall notify each Property Owner, in writing, that Cabot will install, at Cabot's sole expense, a whole house gas mitigation device at the Property Owner's residence.

f. If the Property Owner notifies Cabot, in writing, within sixty (60) days from the date that the Property Owner received the written notice in accordance with Paragraph 6.e., above, that he/she/they agree(s) to Cabot installing a whole house gas mitigation device at his/her/their residence, Cabot shall complete such action at the residence within ninety (90) days from the date that the Property owner notified Cabot, in writing, of his/her/their agreement.

Twelve of the homeowners filed an appeal from the COSA on January 11, 2011. The appeal is docketed at EHB Docket No. 2011-003-L. The Petitioners object to the COSA for several reasons. Among other things, they allege that the Department erred by substituting treatment devices and monetary payments for a previously approved plan to install a pipeline to connect the homes to public water or some other mechanism for permanently restoring or replacing the water supplies. They also object that the Department entered into the COSA without considering the fact that the property owners' water is alleged to be contaminated with toxic constituents in addition to methane. (The COSA only requires Cabot to offer to install treatment systems to address methane.) After all pre-hearing deadlines set forth in our pre-

E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

hearing order passed and with no motions pending, we scheduled a hearing on the merits in the appeal from the COSA to begin on March 19, 2012. The first pre-hearing memorandum in the case is due on January 17, 2012.

The Department in a letter dated May 9, 2011 to Cabot stated the following:

> As of the date of this letter, the Department has received sufficient information to show that Cabot has now completed the following actions:
>
> > Established the 19 Escrow Funds;
> >
> > Provided each of the 19 families that are served by the 18 Affected Water Supplies with written notice of the Escrow Funds and the procedure by which each of the families can obtain payment. The families of Ed and Becky Burke, Frederick and Jessica Hein, Michael and Suzanne Johnson, Timothy and Deborah Maye, Loren Salsman, Richard and Wendy Seymour, and Richard Stover have accepted payment from their respective Escrow funds. To date, the appellants have not yet accepted payment from their respective Escrow Funds; and
> >
> > Provided each of the 19 families that are served by the 18 Affected Water supplies with written notice that Cabot will install, at its sole expense, a whole house gas mitigation device for each of the 18 Affected Water Supplies. Cabot has installed or will soon install such devices at the seven Affected Water Supplies that serve the families of Ed and Becky Burke, Frederick and Jessica Hein, Michael and Suzanne Johnson, Timothy and Deborah Maye, Loren Salsman, Richard and Wendy Seymour, and Richard Stover. To date, the Appellants have not agreed to the installation of any such devices by Cabot.
>
> Cabot's completion of the actions identified above satisfies the requirements under Paragraphs 6.b. through 6.f. of the 2010 Agreement.

The Department provided counsel for the Petitioners with a copy of the May 9, 2011 letter.

E-FILED
12/09/2011
COMMONWEALTH ENVIRONMENTAL HEARING BOARD

On October 18, 2011, the Department sent Cabot a letter, which reads in part as follows:

> The Department has determined that Cabot has satisfied the terms and conditions of paragraph 6 of the COSA and therefore grants Cabot's request to discontinue providing temporary potable water to the remaining property owners subject to the December COSA. Cabot shall do so under the conditions proposed in its October 17, 2011 letter.[1]

The Petitioners filed the appeal docketed at EHB Docket No. 2011-165-L from the Department's October 18 letter on November 18. Although many of the Petitioners' objections appear to relate more to the COSA than the letter, the Petitioners do assert that the Department erred in its finding in the letter that Cabot had complied with Paragraph 6 of the COSA.

On November 23, the Petitioners filed a petition for temporary supersedeas and a petition for supersedeas in the appeal from the October 18 letter. (A petition for supersedeas had not previously been filed in the appeal from the COSA.) Following a conference call on November 29, we issued an order denying the temporary supersedeas. Thereafter, Cabot stopped deliveries of temporary water.

Following our conference call on the temporary supersedeas, we invited the parties to submit briefs on or before December 7 in support of or in opposition to a longer term supersedeas pending a hearing on the merits. The parties did so. Also on December 7, the Petitioners filed a motion to consolidate the appeal from the COSA and the appeal from the October 18 letter, and asked that their petition for a supersedeas be treated as relating to both appeals. We held oral argument on the supersedeas petition by a conference call, which was transcribed, on December 8, 2011.

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[1] Cabot stated in the October 17 letter that it remains willing to install whole house methane mitigation water treatment devices. It has offered to pay for a professional plumber to reconnect water well supplies as well as install the methane treatment systems. It committed to continue to provide temporary water while this plumbing work was being completed to any property owner that requested the work before November 30.

E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

In response to our questioning during the conference, Cabot agreed to provide an unequivocal statement of its willingness to continue to comply with its obligations as described in paragraph 6 of the COSA, notwithstanding the fact that some of its obligations arguably expired due to the passage of time. Following the conference, Cabot filed and served a letter, which reads as follows:

> Please accept the following as Cabot Oil & Gas Corporation's ("Cabot") formal position in connection with today's discussion regarding the above-captioned proceeding:
>
> Cabot agrees to provide an instruction to the Escrow Agent for release of the escrow funds to the Appellants, unqualifiedly and unconditionally, as available in the Escrow Account for each Appellant.
>
> Cabot continues to offer the whole house treatment system which it believes is an effective method of remediation.

In consideration of Cabot's letter, the parties' filings, numerous exhibits, and two oral arguments, we are now able to conclude without the need for further hearings that the Petitioners are not entitled to a supersedeas of the Department's actions in this consolidated appeal.[2]

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Rausch Creek Land, LP v. DEP*, EHB Docket No. 2011-137-L (Opinion and Order, October 6, 2011); *Mountain Watershed Ass'n v. DEP*, EHB Docket No. 2011-073-R (Opinion and Order, September 22, 2011); *UMCO Energy, Inc. v. DEP,* 2004 EHB 797, 802; *Tinicum Township v. DEP,* 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP,* 1999 EHB 649, 651. The grant or denial of a supersedeas is guided by statutory and regulatory criteria, relevant judicial precedent, and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa.

[2] Cabot and the Department said during the conference call that they did not object to the Petitioner's motion to consolidate so long as the preexisting hearing schedule in the COSA appeal is not changed. The Petitioners agreed to that condition. Accordingly, we consolidated the two appeals by separate order today. Our ruling on the supersedeas petition applies in both appeals.

E-FILED
12/09/2011

Code § 1021.63(a). Among the factors we consider are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Hopewell Township v. DEP*, EHB Docket No. 2011-147-M (Opinion and Order, October 17, 2011); *Neubert v. DEP,* 2005 EHB 598, 601; *Westmoreland Land, LLC v. DEP*, EHB Docket No. 2011-037-R (Opinion and Order, October 3, 2011); *Kennedy v. DEP*, 2008 EHB 423, 424; *UMCO Energy, Inc.*, 2004 EHB at 802. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of these criteria. *Hopewell Township, supra*; *UMCO Energy, Inc.*, 2004 EHB at 802; *Global Eco-Logical Services, supra; Svonavec, Inc. v. DEP,* 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group,* 467 A.2d 805, 809 (Pa. 1983). In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria but make a strong showing that it is likely to succeed on the merits of its appeal. *Mountain Watershed Ass'n, supra*, slip op. at 2; *Jordan v. DEP*, 2010 EHB 51, 53.

Irreparable Harm

The *raison d'etre* of a supersedeas is to prevent a party from suffering irreparable harm during the litigation process. *Jefferson County Commissioners, et. al v. DEP*, 2000 EHB 394, 402-403. Paragraph 6 of the COSA, as amplified by the correspondence of October 17, October 18, and December 8, provides that Cabot will immediately resume deliveries of temporary water to the Petitioners if they simply agree to allow Cabot to install a whole-house gas mitigation device in each of their homes, all expenses paid by Cabot. In addition, all that each Petitioner needs to do is ask and Cabot will immediately pay each property owner the amounts listed in Exhibit D to the COSA with no strings attached. Those amounts are as follows:

E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

Landowner	Escrow Amount
Carter, Ronald R. & Jean E.	$ 196,808
Carter, Ronald R. Sr. & Jean E.	147,752*
Ely, Michael, Sr. & Andrea Ely	193,304
Ely, Nolan Scott & Monica Marta-Ely	153,008
Ely, William T. and Sheila A.	286,160
Fiorentino, Norma J. & Joseph A.	228,928
Hubert Ray, Sr. & Victoria Hubert	50,000
Johnson, Michael A. & Suzanne	156,512
Kemble, Raymond & Lorne Schopperth	185,712
Maye, Timothy J. & Deborah L.	366,752
Roos, Erik B. J. & Susan Roos	146,584
Sautner, Craig A. & Julia Sautner	265,720
Seymour, Richard & Wendy Seymour	217,832
Switzer, Victoria (& Jimmy Lee)	162,352
Teel, Ronald J. & Anne	357,992
Burke, Edward	281,632
Hein, Frederick J., Jr. & Jessica L.	199,728
Salsman, Loren A. & Ruth A.	201,480
Salsman, Loren A	8,760**
Stover, Richard C. & Sara A.	398,872

*Carter Tracts combined = $344,560
**Salsman Tracts combined = $210,240

No release or waiver of any kind is required from the Petitioners other than a receipt acknowledging payment of the funds. Cabot will pay the Petitioners without prejudice to their past, existing, or future rights in this appeal or in any other litigation. Although this reservation of the Petitioners' rights would have been clear as a matter of law even without Cabot's December 8 letter in our view, that letter removes all doubt. This is only appropriate because, although done for the benefit of the Petitioners, the COSA is only designed to resolve the *Department's* claim against Cabot. The Department did not and could not have bargained away the Petitioners' individual rights, whatever they may be.

E-FILED
12/09/2011

So, here is the situation as it now stands: with nothing more than a simple request, each Petitioner can at least try out a treatment device. **Temporary water must then resume immediately**. In addition, Cabot cannot stop delivery of temporary water unless and until it is able to install an *effective* treatment device, which is apparently defined as one that actually reduces methane down to 5 parts per million. If Cabot has trouble installing a successful device, temporary water must continue to be delivered, no matter how long it takes. Agreeing to try the device comes with absolutely no obligation, commitment, waiver, or release on the part of the Petitioners. As far as we can tell, there is no downside whatsoever to accepting this offer.

Some of the Petitioners have expressed a concern that they may not be able to use the water even after methane treatment is installed due to other contaminants in the water. That is where the immediately available and unconditional monetary payments come in. Any Petitioner who is unhappy or unwilling to use the water even after successful methane removal will have as much as $398,872 in the bank to hold them over until the hearing on the merits. In fact, the Petitioners will receive these funds even if they are completely satisfied with the treatment devices and the quality of their water. We are informed as of this morning that almost all of the Petitioners have now asked for the funds, and the Department and Cabot have both instructed the escrow agent that the distribution of the funds is approved.[3]

Given this state of affairs, it is very clear to us that the Petitioners do not need to suffer irreparable harm while this appeal runs its course. The only conceivable irreparable harm relates to loss of temporary water supplies, but that loss need not occur. In evaluating the irreparable harm criterion for issuing a supersedeas, the Board considers the extent to which the harm results from the party's own behavior. *Westmoreland Land, LLC, supra*, slip op. at 5-6. Irreparable

[3] The Petitioners say they might need to pay some of these funds to the IRS. If that is true, the Petitioners will still have many tens of thousands of dollars to meet their interim needs.

E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

harm to petitioners is much less compelling when it is caused in substantial part by the petitioners themselves. *Kennedy v. DEP*, 2008 EHB 423, 426; *UMCO*, 2004 EHB at 819; *Tire Jockey Services v. DEP*, 2001 EHB 1141, 1160; *Nicholas v. DEP*, 1992 EHB 219, 224. Every party appearing before the Board has an obligation to mitigate to the extent reasonably possible whatever irreparable harm that it might otherwise suffer pending a hearing on the merits. *UMCO*, 2004 EHB at 819-20. No party should attempt to maximize its injury for purposes of gaining litigation advantage. *See id.*

The COSA finds that the Petitioners were harmed by Cabot's activities, and that is truly unfortunate. However, in the face of an undeniably bad situation, the Petitioners have a legal duty to mitigate the harm that has been visited upon them. The COSA has created a readily available mechanism for mitigating the harm pending resolution of this case. We will not issue a supersedeas as a substitute for utilization of that mechanism. Given the clear lack of unavoidable, irreparable harm in this case, there is no need for us to evaluate the other supersedeas criteria.

Accordingly, we issue the order that follows.

E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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v.	:	**EHB Docket No. 2011-003-L**
	:	**(Consolidated with 2011-165-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL & GAS CORPORATION, Permittee	:	

ORDER

AND NOW, this 9th day of December, 2011, it is hereby ordered that the petition for supersedeas is **denied.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: December 9, 2011

c: **DEP Bureau of Litigation:**
Attention: Glenda Davidson

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E-FILED
12/09/2011
PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

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